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Via e-mail

Date: August 17, 2016

To: Anna Krueger, Program Implementation and Information Division
Office of Resource Conservation and Recovery
U.S. Environmental Protection Agency

cc: Andrew Hanson, Office of Congressional and Intergovernmental Relations, U.S. EPA
Sonya Sasseville, Director, Program Implementation and Information Division, ORCR, U.S. EPA

From: ASTSWMO CERCLA 108(B) Rulemaking Ad Hoc Workgroup

Re: May 18, 2016 Federalism Consultation Briefing – Financial Responsibility Regulations for Hard Rock Mining under CERCLA 108(b)

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has recently established a CERCLA 108(b) Rulemaking Ad Hoc Workgroup to track and comment on this EPA rulemaking. Work Group members have reviewed EPA's May 18, 2016 federalism consultation briefing presentation regarding the forthcoming proposed financial responsibility regulations for hard rock mining, and offer the following comments. These comments have not been reviewed or adopted by the ASTSWMO Board of Directors. In addition, individual State programs may also provide comments based on their own State perspectives and experiences.

Members note that EPA states that their current view is that evidence of financial responsibility under Section 108(b) was not intended to preempt State or local mining reclamation and closure requirements. We also note that EPA further states that, in particular, Section 108(b) financial responsibility is designed to assure that funds are available to pay for CERCLA liabilities, whereas EPA's review of State law financial responsibility requirements to date indicates that many are designed to assure compliance with State regulatory requirements and thus are not "in connection with liability for the release of a hazardous substance" under Section 114(d).

While we appreciate EPA's views, States remain concerned that State financial assurance requirements for closure and reclamation might be preempted by 114(d). It is not much of a stretch to say that closure and reclamation liabilities covered by State financial responsibility requirements are directly related to, and may be a subset of, reducing overall "liability for the release of a hazardous substance." In fact, the reason States and federal agencies regulate and oversee closure and reclamation so closely is to ensure that future releases of remaining contaminants do not occur.

For this reason, members request that EPA make every effort to carefully evaluate preemption of State requirements and thoroughly describe the delineation between 108(b) financial responsibility requirements and State closure and reclamation requirements in the rule and the preamble.

A specific comment relates to allowing the financial test and the formula referenced to calculate the amount. One member noted that the financial test is a problem currently with hazardous waste sites, and suggests it may prove to be a concern with this rule. Not knowing what formula EPA is considering is troublesome because it makes commenting on it at this time difficult.

ASTSWMO appreciates the opportunity to participate in the federalism consultation process for this forthcoming proposed rule, and looks forward to the opportunity to provide further comments when the rule is proposed.